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NO. 08-1425

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT WELCH, WARDEN - PETITIONER

VS.

JOHN C. MOORE, JR. - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Sixth Circuit properly interpret *Faretta v. California*, 422 U.S. 806 (1975) as requiring a state trial court to rule on a defendant's request for self-representation that is clear, unequivocal and timely?

2. Where the defendant's request to proceed *pro se* was clear, unequivocal and timely, did the state courts unreasonably apply *Faretta v. California*, 422 U S. 806 (1975) by failing to consider the request to proceed pro se, thereby permitting the Sixth Circuit to grant a writ of habeas corpus?

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JURISDICTIONAL STATEMENT

Respondent Moore adopts this segment from the Petitioner's Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Moore adopts this segment from the Petitioner's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. THE STATE COURTS NEVER FOUND THAT RESPONDENT MOORE'S REQUEST TO PROCEED PRO SE WAS UNTIMELY.

Respondent John C Moore made a clear, timely and unequivocal request to proceed *pro se* on the fourth day of his state trial

Contrary to the Warden's view, neither the State trial court nor the State Court of Appeals found that Mr. Moore's request to proceed was untimely Sixth Circuit Opinion, Petitioners Appendix, hereafter, App. at 23a.

The trial judge failed to complete the appropriate *Faretta v. California*, 422 U.S. 806 (1975), inquiry with Mr. Moore. Further, the state trial judge failed to make a decision about Mr. Moore's *pro se* request. The trial judge simply decided to do nothing about Mr. Moore's *pro-se* request. The State Court of Appeals approved of this failure to follow *Faretta*, while expressing misgivings about its approach. (See State Court of Appeals Opinion App at 115a) As a result, the State courts misapplied the clearly established principles set by this Court in *Faretta*. Thus, the writ of habeas corpus was properly granted.

On the third day of the state trial Mr. Moore specifically asked the trial judge twice, "Can I go *pro se*?" Sixth Circuit Opinion App at 5a-8a. The state trial judge

initially denied Mr. Moore's request but immediately changed his mind. Sixth Circuit Opinion App. at 8a-9a. The state trial judge decided that he would consider a written letter/motion from Mr Moore to proceed *pro se* Sixth Circuit Opinion App. at 9a.

Mr Moore drafted the written letter/motion during the court's lunch recess as instructed. Sixth Circuit Opinion App. at 11a-12a However, Mr. Moore's attorney did not deliver this letter/motion to the state trial judge until the following morning. Sixth Circuit Opinion App. at 11a-12a. Once the state trial judge received Mr Moore's letter, he did not immediately address it. Sixth Circuit Opinion App. at 11a-12a. Instead the state trial judge continued with the trial. Sixth Circuit Opinion App. at 12a

When the state trial judge finally addressed Mr. Moore's letter, Mr. Moore's attorney had already presented a substantial portion of the defense case. Sixth Circuit Opinion App at 15a-18a and Ohio Court of Appeals Opinion for the Eighth District Opinion App. at 115a. The state trial judge found that Mr. Moore had abandoned any possible request to proceed *pro se* when he complied with the order of the court that defense counsel proceed Sixth Circuit Opinion App. at 15a-16a and Ohio Court of Appeals for the Eighth Appellate District Opinion App. at 114a.

But denied saying it was unreasonable

On review, the Ohio Court of Appeals for the Eighth Appellate District found that Mr. Moore properly and timely requested to proceed *pro se* in his letter to the court. Sixth Circuit App. at 23a and Ohio Court of Appeals for the Eighth Appellate District Opinion App. at 114a. Neither the state trial court nor the state appellate court rejected Mr. Moore's request to proceed pro se for untimeliness. Sixth Circuit Opinion App. at 23a. The State Court of Appeals also noted that there is no requirement that a request to proceed *pro se* be made before trial. State Court of Appeals Eighth District Opinion App. at 112a.

The Ohio Supreme Court denied Mr. Moore's leave to appeal. Supreme Court of Ohio Entry App. at 100a. Thus, the last merit decision from the highest State Court is the State Court of Appeals' opinion. It did not reject Mr. Moore's request as untimely. Thus, this fact was binding on the Sixth Circuit and this Court. See 28 U S.C. 2254(e)1. *Sumner v. Mata*, 449 U.S. 539 (1981).

The District Court found that the state trial court unreasonably applied *Faretta* by failing to conduct an appropriate hearing on the record to determine whether Mr. Moore was knowingly and voluntarily waiving his right to counsel. United States District Court for the Northern District of Ohio Opinion App. at 51a-53a The Sixth Circuit

affirmed the District Court's grant of a conditional writ of habeas corpus. Sixth Circuit Opinion App. at 25a-26a The Sixth Circuit found that Mr. Moore had been deprived of his Sixth Amendment right to self-representation when the state trial court failed to rule on his timely, clear and unequivocal request to proceed *pro se* and failed to apply clearly established law from this Court in the form of *Faretta v. California* 422 U.S. 806 (1975). Sixth Circuit Opinion App. at 25a.

On the record before this Court, neither the state courts, nor the federal courts, have ever accepted the State's position that the request to proceed pro se was untimely.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The state courts consistently recognized that Respondent Moore's request to proceed pro se was timely.

The Court should deny the Warden's petition for a writ of certiorari because the Sixth Circuit properly determined that the actions or, more accurately, inaction of the state trial court, deprived Mr. Moore of his right to self-representation afforded to him by the Sixth and Fourteenth Amendments. The ultimate question before this Court is whether the decision of the Sixth Circuit was correct in holding the state trial court to the standard set in *Faretta* when determining if a defendant may invoke his/her Sixth and Fourteenth Amendments' right to self-representation. Contrary to the Petitioner's view, the Sixth Circuit decision has not limited a trial court's discretion.

Since the *Faretta* decision issued, trial courts have had no discretion in deciding the proper inquiry when a defendant makes a clear, unequivocal and timely request to proceed pro se. The Sixth Circuit decision merely required that the trial court comply with the requirements set forth in *Faretta* to determine the appropriateness of Respondent Moore's request to proceed *pro se*

II. **The trial court's failure to issue a formal denial of Respondent Moore's self-representation request deprived Mr. Moore of his Sixth and Fourteenth Amendments' right to self-representation.**

A writ of habeas corpus may issue pursuant to 28 U.S C. 2254 if the state court decision is either (1) contrary to or (2) involved unreasonable application of clearly established federal law. *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000). A state court violates the first prong when it either "arrives at a conclusion opposite to that reached by this Court on a question of law" or decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U S. at 413. A state court violates the second prong when it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case " *Williams v. Taylor*, 529 U.S. at 407. The unreasonable application test is also satisfied when a state court improperly extends or fails to extend a legal principle in the proper context. *Williams v. Taylor*, 529 U.S. at 407

The *Williams* Court defined "clearly established federal law" as "the holdings, as opposed to dicta, of this Court's decisions as of the time of the relevant

state-court decision." *Williams v. Taylor*, 529 U.S. at 412. It cannot be said that a state court "unreasonably applied … clearly established Federal law" if there are a lack of applicable holdings from the United States Supreme Court *Carey v. Musladin*, 549 U.S. 70, 77 (2006).

The Sixth Circuit found the state courts' decisions to be an "objectively unreasonable misapplication of the law as clearly established in *Faretta*" and therefore granted Mr. Moore habeas relief. (Sixth Circuit Opinion App at 25a) *Faretta v. California* was the only relevant, clearly established federal law at the time of the state trial court's decision. *Williams v. Taylor*, 529 U.S. at 412. Further, *Faretta* has not been overruled nor questioned in the thirty-four years since it was decided and has been used as support for any number of this Court's decisions since 1975. See, e.g. *Indiana v. Edwards*, _US_, 128 S.Ct. 2379 (2008), *McKaskle v. Wiggins*, 465 U.S. 168 (1984), *Godinez v. Moran*, 509 U.S. 389 (1993).

Under the *Faretta* analysis, a defendant must make a clear, unambiguous, and timely request for self-representation. *Faretta v California*, 422 U.S. at 835-36. The State Court of Appeals found that Mr. Moore

properly and timely requested to proceed *pro se* in his letter/motion to the trial court. District Court Report and Recommendation App at 78a. State Court of Appeals Opinion, App. at 114a. None of the courts that have reviewed this issue, with the exception of the trial court, has felt that Mr. Moore's request was even remotely unclear or ambiguous. Like the defendant in *Faretta*, Mr Moore's request to proceed *pro se* was contingent, but also as in *Faretta* that does not make his request unclear or ambiguous. *Faretta v. California*, 422 U S at 807.

The State Court of Appeals also noted that a request to proceed *pro se* need not be made before trial State Court of Appeals Eighth District Opinion App. at 112a. All of the lower courts reviewing this error have found Mr. Moore's letter/motion to be clear, unambiguous, and timely Sixth Circuit Opinion App. at 23a. Therefore, Mr. Moore's letter was a sufficient and proper request to represent himself and met the first step of the *Faretta* analysis.

The second step of the *Faretta* analysis requires the trial judge to conduct a colloquy to assure the defendant's waiver of counsel is voluntary, knowing, and intelligent *Faretta v. California*, 422 U S. at 835-36.

For the trial court to properly fulfill this step it must have discussed with Mr. Moore the dangers of *pro se* representation and the right to counsel he would have given up *Faretta v. California*, 422 U S. at 835

The only discussion the trial judge held with Mr. Moore concerning the dangers of self-representation took place before the trial judge read Mr. Moore's letter/motion requesting to proceed *pro se*. Sixth Circuit Opinion App at 5a-10a. The trial judge never engaged in the required *Faretta* colloquy with Mr Moore Sixth Circuit Opinion App. at 23a.

The final step of *Faretta* requires the trial judge to make a decision on the request to proceed *pro se*. *Faretta v. California*, 422 U.S. at 808-811. The Warden cites several cases for the proposition that motions may be denied by a court for a number of reasons including delay, silence, and the entry of a final judgment. (See Petitioners Writ of Certiorari pp 11-12) However, because of the import of the rights involved, *Faretta* does not permit a motion to proceed *pro se* to be passively denied. The denial of a motion to proceed *pro se* is not the denial of any ordinary motion. The denial of a motion to proceed *pro se* is the denial of a

personal liberty granted by the Sixth and Fourteenth Amendments.

"The right to defend is personal." *Faretta v. California*, 422 U.S. at 834. It is precisely because the denial of a motion to proceed *pro se* infringes upon a personal liberty that these motions must be promptly considered per *Faretta* and then be ruled upon by the trial judge. Only by a prompt ruling can society be assured that a defendant's personal liberties are protected. If a trial judge is not required to make a prompt ruling on a *pro se* request then a request made at any time can simply be ignored until it becomes moot. This scenario would ultimately result in a violation of a defendant's Sixth and Fourteenth Amendment rights

Faretta requires that the right to proceed pro se, an invocation of a defendant's Sixth and Fourteenth Amendment right, should also be safeguarded by the requirement of a thorough colloquy between the defendant and the judge whenever the right of self-representation is invoked. The colloquy that is required has been in place since 1975 when this Court decided *Faretta*. The Sixth Circuit's decision merely recognizes that the *Faretta* colloquy must be conducted to assure that a defendant's constitutional rights are protected.

III. If Respondent Moore's request to proceed *pro se* had been found to be untimely, then the decision to grant or deny his request resided in the trial court's sound discretion. In the absence of a finding of untimeliness, the trial judge unreasonably applied clearly established federal law in declining to grant that request to proceed pro se.

As the Sixth Circuit correctly stated, neither the trial court nor the state appellate court rejected Mr. Moore's requests to proceed *pro se* for being untimely Sixth Circuit Opinion App at 23a. The state trial court failed to either accept or reject Mr. Moore's request to proceed *pro se* on any grounds. It would have certainly been within the trial court's discretion to reject Mr Moore's request if the trial court found his request to be untimely; however, the trial court failed to make any findings about Mr. Moore's request.

The Warden cites several cases for the proposition that the trial court has discretion to determine if a motion to proceed *pro se* should be granted See Petitioners Writ of Certiorari p. 12. It is undisputed that a trial court generally has the discretion to determine if a motion should be granted; however, even in each case cited by the Warden the motion was not denied until after the appropriate *Faretta* inquiry had been conducted, findings had been made and a decision regarding the motion was issued. These inquiries and decisions were often not lengthy but they still took

place. In the case at bar, no meaningful inquiry took place and the trial court made no decision about Mr. Moore's unequivocal motion to proceed *pro se*.

The Warden frames the Sixth Circuit decision as one that limits a trial court's discretion because it requires trial courts to make a *Faretta* inquiry whenever a defendant makes a request to proceed *pro se* The Sixth Circuit decision in no way prevents the trial court from using its discretion in determining if a defendant may proceed *pro se*. The Sixth Circuit merely insisted that the trial court comply with what was already required by *Faretta*, that (1) the defendant make a clear, unambiguous, and timely request for self-representation, (2) the trial judge conduct a colloquy with the defendant to insure the request is voluntarily, intelligently, and knowingly made, and (3) the trial judge make a decision that is discernable from the record *Faretta v California*, 422 U.S. at 808-11, 835-36.

The Sixth Circuit did not require the inquiry to be lengthy. Further, the Sixth Circuit decision does not prevent the trial court from finding at the outset that the request is untimely or equivocal. The Sixth Circuit decision simply requires the trial court to make that finding on the record and clearly decide that the request to proceed *pro se* is denied. The Sixth Circuit opinion merely requires that

courts comply with the long-standing standard clearly outlined in *Faretta*.

As the opinion below is not novel, nor does it establish a variance with *Faretta*, the petition for a writ of certiorari should be denied.

CONCLUSION

For the above reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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